

Saavedra Herrera (Migration) [2018] AATA 3604 (21 August 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Abraham Saavedra Herrera
CASE NUMBER:	1620321
DIBP REFERENCE(S):	BCC2015/669503
MEMBER:	Amanda Mendes Da Costa
DATE:	21 August 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(2) of Schedule 2 to the Regulations • cl.820.221(1) of Schedule 2 to the Regulations • r.2.03A

1. Statement made on 22 August 2018 at 10:07am

2.

CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) – Whether the parties are in a genuine de facto relationship – Moderate financial pooling – Limited evidence of joint household responsibilities – Parties not currently cohabitating – Parties actively seeking joint residence – Relationship represented to others – Relationship viewed as continuous and ongoing by the parties – Decision remitted with direction

LEGISLATION

Acts Interpretation (Registered Relationships) Regulations 2008 (Cth)
Migration Act 1958 (Cth), ss 5CB, 65, 359(2)
Migration Regulations 1994 (Cth), r 2.03A, Schedule 2, cls 820.211, 820.221
Relationship Act 2008 (Vic)

CASES

Bretag v MILGEA [1991] FCA 582

3.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision of a delegate of the Minister for Immigration on 24 November 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 2 March 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
6. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 and c;.820.221 because the delegate was not satisfied that there was sufficient evidence to demonstrate that the applicant was the spouse or de facto partner of the sponsor, as defined under sections 5F and 5CB of the Act.
7. The applicant seeks review of the delegate's decision and for that purpose has provided a copy of the primary decision to the Tribunal.
8. The applicant appeared before the Tribunal on 26 July 2018 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Alexandra Kimpton, the applicant's sponsor.
9. On 27 July 2018 the Tribunal wrote to the applicant, pursuant to s359 (2) of the Act, inviting him to provide further information about the financial aspects of his relationship with Ms Kimpton; his living arrangements with Ms Kimpton and the social aspects of their relationship.
10. On 10 August 2018 the applicant provided the Tribunal with the following additional documents:
 - Statutory Declaration of Jose Luis Saavedra Morales, dated 7 August 2018.
 - Statutory Declaration of Maximiliano Tenaglia dated 7 August 2018.
 - Statutory Declaration of Tod La Marr, dated 8 August 2018.
 - Statutory Declarations by the applicant and his sponsor, dated 10 August 2018.
 - Residential tenancy Applications signed by the applicant and sponsor, dated 16 June 2018.
 - Copy bank statements for a joint account operated by the applicant and sponsor, for the period 22 May 2017 to 30 May 2018.
11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issue in the present case is whether the applicant is the de facto partner of the sponsor as defined under section 5CB of the Act.

Whether the parties are in a spouse or de facto relationship

13. Clause 820.211 (2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen. The Tribunal notes that a copy of the bio-page of the sponsor's Australian passport is on the Department's file. On the basis of the information before it, the Tribunal is satisfied that Ms Kimpton is an Australian citizen and accordingly, the sponsor satisfies the requirements of cl.820.211(2)(b) and cl.820.221(1).
14. The Tribunal notes from the Department's file that Ms Kimpton has completed a Form 40SP Sponsorship for a partner to migrate to Australia dated 1 March 2015. The Tribunal is satisfied from the information contained in that document and the oral evidence of Ms Kimpton that at the time of application and at the time of this decision, the applicant is sponsored. Accordingly the requirements of cl.820.211(2)(c) and cl.820.221(1) are met.
15. On the basis of the evidence before it, the Tribunal is satisfied that at the time of application, the applicant was the holder of a substantive visa. Accordingly, the requirements of cl.820.211(2)(d) and cl.820.221(1).

Are the parties in a de facto relationship?

16. As the parties are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
17. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
18. In making its findings about the circumstances of the relationship, the Tribunal has applied the principles espoused in *Bretag v MILGEA* [1991] FCA 582 for the purpose of determining whether the relationship is genuine and continuing. In considering the documentation provided to the Tribunal and the oral evidence of the applicant and sponsor, the Tribunal must be satisfied that the parties are in a de facto relationship that is valid for the purposes of the Act as required by s.5CB(2).

19. *Inception and development of the relationship*

20. The parties claimed to have met each other on 3 December 2013 at the home of the sponsor, when they were introduced by one of her housemates. At this stage, Ms Kimpton was sharing house with two others. There were two bedrooms downstairs and a bedroom, kitchenette and bathroom upstairs, which she used. This house was owned by Ms Kimpton's aunt and uncle and she was responsible for organising the other tenants and

collecting rental and utilities payments from the other tenants. Mr Herrera stayed in the housemate's room for a few weeks in late 2013 and early 2014, when the housemate went on holidays. The couple's relationship developed from there and in July 2014 they commenced living together and shared upstairs bedroom in the share house. The couple continued to live there until July 2017 when Mr Herrera decided to move out. He explained to the Tribunal that he did not want to continue living in Richmond or share the house with the other tenants present there. He also said that although he and Ms Kimpton had been experiencing some 'ups and downs' in their relationship, his decision to no longer live with Ms Kimpton, did not indicate that they had ended their relationship.

21. Ms Kimpton told the Tribunal that Mr Herrera had moved out of their share house because he was not happy living in Richmond and he "wanted more space". She said that it was convenient to her work and financially viable for her to continue living in the house in Richmond. She explained that her relationship with Mr Herrera was continuing despite the fact that they were not living in the same house.

22. *The financial aspects of the relationship*

23. The Tribunal is required to consider all the circumstances of the financial aspects of the relationship.
24. The principal documentary evidence provided to the Tribunal regarding the financial aspects of the parties' relationship was a statement for a joint bank account with the Commonwealth Bank for the period 22 May 2017 to 30 May 2018. This statement shows regular transfers of money into the account and periodic withdrawals for payment of restaurant meals and social activities. This is consistent with the oral evidence of the parties regarding the use of their joint bank account.
25. The parties told the Tribunal that they have always been financially independent of each other and have operated separate bank accounts into which their respective salaries have been deposited.
26. On consideration of the evidence, the Tribunal finds that the parties have not pooled their financial resources to any significant extent or in relation to major financial commitments. Moreover, the Tribunal finds no evidence that the parties have acquired joint ownership of real estate or other major assets; and no evidence that the parties have joint liabilities or that one person in the relationship owes any legal obligation in respect of the other.
27. The Tribunal gives some positive weight to the evidence of the financial aspects of the relationship because the parties have a joint bank account that they regularly use; however, there is no other evidence of the financial arrangements of the parties.

28. *The nature of the household*

29. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.
30. The Tribunal does not have any evidence that either Mr Herrera or Ms Kimpton have any children, either together or of their own. There is no evidence of any joint responsibility for the care and support of any children. The parties told the Tribunal that when they were living together they shared housework, shopping and cooking. Ms Kimpton was responsible for organising the collection of rental and utilities payments from the other tenants and she and Mr Herrera cared for the garden. Mr Herrera was also responsible for some maintenance

tasks. The Tribunal finds no evidence that since July 2017 the parties have either lived together or shared the responsibility for housework.

31. The Tribunal attaches limited positive weight to the household aspects of the relationship because although the parties have lived together and shared housework, shopping and cooking, they are no currently sharing these tasks.

32. *The social aspects of the relationship*

33. Whether the persons represent themselves to other people as being de facto partners, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
34. The Tribunal notes that Mr Herrera is a chef and Ms Kimpton is a graphic designer. They told the Tribunal that they socialise together with friends who have common interests in the performing, visual and culinary arts. They also said they socialise on a regular basis with Ms Kimpton's family, including the sharing of significant family occasions such as Christmas. The parties also [provided the Tribunal with statutory declaration from several of their friends, attesting to the genuine and continuing nature of the relationship and their regular socialising with Ms Kimpton's family and mutual friends.
35. The Tribunal also received a number of photographs from the parties depicting them in various social settings, including family outings with members of Ms Kimpton's family, meals with friends and on holidays together. The Tribunal views these photographs as genuine.
36. The Tribunal further notes that in his statutory declaration Mr Tenaglia attests to socialising with the parties on a regular basis.
37. On the basis of the evidence before it, the Tribunal is satisfied that the parties socialise with each other and friends on a regular basis and are accepted by the friends and acquaintances as being in a genuine and continuing relationship and attaches significant weight to the social aspects of the relationship.

38. *The nature of the persons' commitment to each other*

39. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see the relationship as a long term one are all aspects to be considered in determining the nature of the person's commitment to each other.
40. The parties told the Tribunal that despite living apart, they were still in a committed relationship and were not romantically involved with any other persons. Mr Herrera explained he continued to live in a shared house in Brunswick, whilst Ms Kimpton recently moved out of the property in Richmond and was currently living in her grandmother's home in Caulfield. They parties said that in the past few months they had jointly applied (unsuccessfully) for rental properties in the Northern suburbs of Melbourne. They intended to continue applying for rental properties and hoped to be able to live together again in the near future.
41. The Tribunal accepts that the Residential Tenancy Applications made by the parties indicate that they have recently made applications for the joint rental of houses in the northern suburbs of Melbourne. The Tribunal accepts that these applications evidence an intention by the parties to recommence living together and setting up a joint household.

42. The Tribunal notes that it was provided with joint statements from the parties dated 3 December 2016 and 10 August 2018, attesting to the genuine and committed nature of their relationship. Although the earlier statement was written prior to the parties deciding to live separately, the latter statement attests to the parties' current intentions.
43. The Tribunal further notes that it was provided with evidence of ongoing communication between the parties in the form of text messages. The Tribunal accepts that the content of the messages appears to be consistent with genuine communication about personal, family and day-to-day-events.
44. The Tribunal accepts the evidence of the parties that despite living apart for a number of months, their relationship continued and that it has strengthened in recent months. The Tribunal further accepts that although they have not recently live together, they have taken steps to remedy this situation and have continued to socialise together as a couple.
45. The Tribunal attaches significant weight to the commitments of the parties to each other.
46. Having regard to all the circumstances of the relationship, the Tribunal is satisfied that when the application was made and at the time of this decision, the applicant and sponsor had a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied that at the time of application the parties were living together and at the time of decision they are not living separately or apart on a permanent basis. On the basis of the above, the Tribunal is satisfied that the requirements of s.5CB (2) are met at the time the visa application was made and at the time of this decision.
47. The Tribunal is satisfied that the applicant and sponsor are not related by family.
48. On the basis of the above the Tribunal is satisfied that the requirements of s.5CB (2) are met at the time the visa application was made and the time of this decision.
49. Therefore the applicant meets cl.820.211(2) and cl.820.221(1).

Are the additional criteria for a de facto relationship met?

50. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
51. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
52. The applicant has provided evidence by means of a Relationship Certificate dated 12 January 2017, that the relationship is registered under the *Relationship Act* 2008 (Victoria) as a kind of relationship prescribed in the *Acts Interpretation (Registered Relationships) Regulations* 2008: r.2.03A(5). Accordingly, the 12 month requirement does not apply.
53. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in r.2.03A.

54. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

55. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
- cl.820.211(2) of Schedule 2 to the Regulations
 - cl.820.221(1) of Schedule 2 to the Regulations
 - r.2.03A

Amanda Mendes Da Costa
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).